NO. 85-977

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

ALVIN C. COPELAND,

Petitioner

VS.

HEBERT RODRIGUE, BURTON G. KLEIN and MARY BORRELL

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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THE QUESTIONS PRESENTED

1.

Whether the Louisiana Supreme Court violated Petitioner's rights under the First Amendment to the United States Constitution when it utilized Louisiana Nuisance Law to issue an injunnction limiting in scope and extent Petitioner's symbolic and arguably religious speech at his private home, when other means of abating the purported nuisance without limiting Petitioner's speech may have been available.

2.

Whether Petitioner's constitutional rights under the First Amendment of the United States Constitution were violated when the Louisiana Supreme Court utilized Louisiana Nuisance Laws to regulate Petitioner's symbolic speech, when the purported nuisance has been caused by third parties seeking to hear and to view Petitioner's symbolic speech.

LIST OF INTERESTED PARTIES

The following list of persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Mary Borrell

Alvin C. Copeland

Burton G. Klein

Popeyes, Inc. (formerly Popeyes Famous Fried Chicken & Biscuits, Inc., formerly Popeyes Famous Fried Chicken, Inc.)

Herbert Rodrigue

TABLE OF CONTENTS

	PAGE
Questions Presented	i
List of Interested Parties	ii
Table of Contents	iii
Table of Authorities	iv
Petition for Certiorari	1
Opinions Below	1
Jurisdictional Grounds in This Court	3
Constitutional and Statutory Provisions	3
Statement of the Case	5
Reasons For Granting Petition	11
Conclusion	19
Certificate of Service	20
APPENDIX A	A-1
APPENDIX B	A-24
APPENDIX C	A-26
APPENDIX D	A-30
APPENDIX E	A-35
APPENDIX F	A-37
APPENDIX G	A-39
APPENDIX H	A-43
APPENDIX I	A-45
APPENDIX J	A-47
APPENDIX K	A-49

TABLE OF AUTHORITIES

CASES **PAGE**

ACORN v. City of New Orleans, 606 F.Supp. 16 (E.D.La. 1984).....13

Consolidated Edison Company v. Public Service Commission, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980).....13

Davenport v. City of Alexandria, Virginia, 710 F.2d 148 (4th Cir. 1983).....13

Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).....15

Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).....11,13

Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).....13

Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971).....13

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973), rehearing denied, 414 U.S. 881, 94 S.Ct. 27,38 L.Ed.2d 128, 419 U.S. 887 95 S.Ct. 163 (1973).....15

Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1979).....12

Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), rehearing denied, 361 U.S. 950, 80 S.Ct. 399 (1960).....15

Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).....15

Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).....12

Tinker v. Des Moines School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).....12

TABLE OF AUTHORITIES (con't)

CASES **PAGE**

United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971).....13

STATUTES

United States Constitution, First Amendment.....3,8,9,12
United States Constitution, Fourteenth Amendment.....4
Title 28, United States Code, Section 1257(3).....3
Louisiana Civil Code, Article 667.....4
Louisiana Civil Code, Article 668.....4
Louisiana Civil Code, Article 669.....5

No.

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

Alvin C. Copeland petitions for a Writ of Certiorari to review the decree of the Supreme Court of Louisiana in this case.

OPINIONS BELOW

The Opinion and Decree of the Supreme Court of Louisiana from which review is sought (Appendix A, *infra*, pp. A-1,A-23)is reported at 475 So.2d 1071 (La. 1985).

The Opinion of the Louisiana Court of Appeal for the Fifth Circuit which was reversed by the Louisiana Supreme Court (Apendix K, *infra*, pp. A-49,A-59) is reported at 465 So.2d 67 (La.App. 5th Cir. 1985).

The other judgments, opinions and reasons for judgment rendered by the Louisiana Courts are not reported, but were as follows:

1. The Original Judgment (Appendix B, *infra*, pp. A-24,A-25) and Reasons for Judgment (Appendix C, *infra*, pp. A-26,A-29) of the Twenty-Fourth Judicial District Court denying preliminary injunctive relief, in the case entitled "Herbert Rodrigue, et al v. Al Copeland, et al", Civil Action Number 289-098, consolidated with 289-142, dated December 15, 1983.

2. The Opinion and Order of the Louisiana Court of Appeal, 5th Circuit, denying Supervisory Writs, in the case entitled "Herbert Rodrigue, et al v. Alvin C. Copeland, et al", Number 83-C-855, dated December 22, 1983 (Appendix D, *infra*, pp. A-30,A-34).

3. The Order of the Louisiana Supreme Court (Appendix E, *infra*, pp. A-35,A-36) denying Supervisory Writs in the case entitled "Herbert Rodrigue, et al v. Alvin C. Copeland, et al", Number 83-CC-2642, dated January 16, 1984.

4. The Judgment (Appendix F, *infra* pp.A-37,A-38), and Reasons for Judgment (Appendix G, *infra* pp. A-39,A-42) rendered by the Twenty-Fourth Judicial District Court with respect to the permanent injunction, in the case entitled "Herbert Rodrigue, et al v. Al Copeland, et al", Civil Action Number 289-098, consolidated with 289-142, dated August 31, 1984.

5. The Amended Judgment (Appendix H, *infra*, pp. A-43,A-44) rendered by the Twenty-Fourth Judicial District Court in the case entitled "Herbert Rodrigue, et al v. Al Copeland, et al", Civil Action

Number 289-098, consolidated with 289-142, dated September 10, 1984.

6. The Opinion and Order of the Louisiana Court of Appeal, Fifth Circuit (Appendix I, *infra* pp. ?-?) denying Supervisory Writs from the August 31, 1984 and September 10, 1984 Judgments, in the case entitled "Parish of Jefferson, et al v. Alvin C. Copeland, et al", Number 84-C-646, dated December 12, 1984.

7. The Order of the Louisiana Supreme Court (Appendix J, *infra*, pp. A-47.A-48) denying Supervisory Writs from the August 31, 1984 and September 10, 1984 Judgments, in the case entitled "Parish of Jefferson, et al v. Alvin C. Copeland, et al", Number 84-CC-2108, dated December 14, 1984

JURISDICTION

The Opinion and Decree of the Supreme Court of Louisiana were entered on September 10, 1985 (Appendix A, *infra*, pp A-1, A-23). This Petition for Certiorari is being filed within the prescribed period of ninety days after September 10, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3), because a title, right, privilege or immunity was claimed under the Constitution or Statutes of the United States, which claim was rejected by the Supreme Court of Louisiana.

CONSTITUTIONAI PROVISIONS AND STATE STATUTES INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press ..."

2. The Fourteenth Amendment to the United States Constitution provides in relevant part:

"Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws ..."

3. The Louisiana Supreme Court based its restrictions upon Petitioner's symbolic speech upon the following provisions of the Louisiana Statutes Annotated, Louisiana Civil Code:

"Article 667. Limitations on use of property

"Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him.

"Article 668. Inconvenience to neighbor

"Although one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet everyone has the liberty of doing on his own ground whatsoever he pleases, although it

should occasion some inconvenience to his neighbor.

"Thus he who is not subject to any servitude originating from a particular agreement in that respect, may raise his house as high as he pleases, although by such elevation he should darken the lights of his neighbors's [neighbor's] house, because this act occasions only an inconvenience, but not a real damage.

"Article 669. Regulation of inconvenience

"If the works or materials for any manufactory or other operation, cause an inconvenience to those in the same or in the neighboring houses, by diffusing smoke or nauseous smell, and there be no servitude established by which they are regulated, their sufferings must be determined by the rules of the police, or the customs of the place."

STATEMENT OF THE CASE

Since 1977, Petitioner, Alvin C. Copeland, annually maintained a Christmas display on his premises at 5001 Folse Drive, Metairie, Louisiana, during most of December and the first week of January. The display, consisting of many lights and lighted figures, including religious symbols and banners, has drawn numerous spectators, particularly since 1982. Petitioner's neighborhood is a limited access area, zoned solely for single family residences. (See map of the neighborhood, last page of the Opinion of the Louisiana Supreme Court, Appendix A, *infra*, p. A-22; 475 So.2d at 1081).

Apparently, the numerous spectators to Petitioner's display began to cause traffic and pedestrian congestion in Petitioner's neighborhood, and some spectators apparently caused damage to some of Petitioner's neighbors by public urination, trespassing and loud noise. On November 30, 1983, Respondents herein, Herbert Rodrigue, Burton G. Klein and Mary Borrell (Rodrigue, et al), neighbors of Petitioner, instituted an action (CA Number 289-098) in the Twenty-Fourth Judicial District Court to enjoin Petitioner from erecting and maintaining his Christmas display, alleging, *inter alia*, that the subject Christmas decorations, because "thousands of people, traveling in vehicles, are attracted to the site each evening," constituted a nuisance to the surrounding neighborhood, under the terms of the Louisiana Civil Code, Articles 667 to 669. (See Petition, Record, Vol. I, p.3)

On December 1, 1983, the Parish of Jefferson brought another action (CA Number 289-142), also seeking injunctive relief. The primary basis for the said Parish suit, however, was the alleged presence of decorations and other structures on parish property adjoining 5001 Folse Drive, and said suit was not before the Louisiana Supreme Court below, and is not involved herein.

The two suits were consolidated, and testimony was heard on December 6, 1983, and December 13, 1983, with respect to the preliminary injunction requested by Rodrigue, et al. One of the witnesses was the Sheriff of Jefferson Parish, who testified concerning a plan devised by the Parish Sheriff's Office to facilitate a smoother flow of traffic in the neighborhood; the object was to regulate the traffic and the viewers of Petitioner's display, rather than the display itself.

In defending the suits against him in the district

court. Petitioner denied that his Christmas display could constitute a nuisance under Louisiana Law. In addition, however, Petitioner asserted in his Answer to the Petition of Rodrigue, et al (Record, Vol. I, pp. 68-69), and at the outset of the first day of trial on December 6, 1983, (Transcript, December 6, 1983 hearing, Twenty-Fourth Judicial District Court, pp. 15-17) that even were there a nuisance, Petitioner's Christmas display could not be enjoined without violating Petitioner's "freedom of religion and freedom of speech and expression, as expressly secured to defendant Copeland by the Constitution of the United States of America. (Record, Vol. I, p. 69)

The district court denied the Request for a Preliminary Injunction, on the basis that the display of Petitioner did not constitute a nuisance. As a result, the trial court did not have to decide the constitutional issues raised by Petitioner.

The trial of the Permanent Injunction was held on July 31, 1984. After trial, the Twenty-Fourth Judicial District Court granted limited injunctive relief, limiting the number of days and the hours in which Petitioner could exhibit his Christmas display. See Judgment, August 31, 1984 (Appendix F, *infra*, pp. A-37,A-38) and Amended Judgment, September 10, 1984 (Appendix H, *infra*, pp. A-43,A-44).

Petitioner and Rodrigue, et al., appealed. In his Brief before the Louisiana Court of Appeal for the Fifth Circuit, Petitioner reiterated his claim that his Christmas display could not be curtailed without violating his Constitutional Rights:

> "An injunction against Appellee Copeland depicting such representations in his Christmas decorations would violate his freedom of religion,

> freedom of speech and right to privacy provisions quoted above in the Louisiana and United States Constitutions." (Record, Volume I, Brief of Alvin C. Copeland in Number 84-CA-572, Louisiana Fifth Circuit Court of Appeal, p. 31.)

The Court of Appeal affirmed the Amended Judgment of the Twenty-Fourth Judicial District Court in an Opinion dated February 11, 1985, and reported at 465 So.2d 67 (La.App. 5th Cir. 1985). The Court of Appeal held that the date and hour restriction imposed upon Petitioner's showing of his Christmas display abided by the requirements of the United States Constitution with respect to free speech. In reaching this result, however, the Court of Appeal emphasized the narrow and limited nature of the restrictions imposed by trial court, and inferred that the restrictions could not be much broader than those it affirmed:

> "However, the state may not enforce blanket non-speech statutes that do not bear a rational relationship to the public interests in preserving order and tranquility ... Hence, Jefferson may impose restrictions on activities that offend the public peace, however, they may not impose blanket restrictions against expressions of religious belief by homeowners." Appendix K, *infra*, p. A-57; 465 So.2d at 72 (Citations omitted).

Rodrigue, et al, then successfully applied for Writs of Certiorari to the Supreme Court of Louisiana. In his Brief before the Louisiana Supreme Court, Petitioner once again reiterated his position that his Christmas display could not be limited without violating his rights to freedom of religion and freedom of speech, under the First Amendment

of the United States Constitution (Record, Louisiana Supreme Court, Original Brief of Copeland, pp. 30-36). In an Opinion and Decree dated September 10, 1985, the Louisiana Supreme Court reversed the holding of the Louisiana Court of Appeal. The court held that, because Petitioner's Christmas display attracted visitors who caused damage to Rodrigue, et al, the display constituted a nuisance. Furthermore, the Louisiana Supreme Court held that, with respect to the traffic plan instituted by the Jefferson Parish Sheriff's Office "[a]lthough the plan has facilitated a smoother (quicker) flow of traffic, the remaining problems still exist." Appendix A, *infra*, p. A-27; 475 So.2d at 1079.

As a result, the Supreme Court issued an Injunction restricting the scope and content of Petitioner's display itself:

> "Plaintiffs' injury stems from the nature and size of the display which render it incompatible with a restricted access, residential neighborhood. Defendant is enjoined from erecting and operating a Christmas exhibition which is calculated to and does attract an unusually large number of visitors to the neighborhood.
>
> "In complying with our order, defendent is specifically enjoined from placing oversized lighted figures, such as the reindeer and snowman, in his yards or upon the roof of his residence. The proper place for these 'commercial size' decorations is not within a quiet, residential neighborhood. Defendant is also specifically ordered to reduce the volume of any sound accompanying the display so that it is not audible from within the closest homes of his neighbors.

"In limiting his display, the burden is placed on defendant to reduce substantially the size and extravagance of his display to a level at which it will not attract the large crowds that had been drawn to the neighborhood in the past." Appendix A, *infra*, pp. A-18, A-19; 475 So.2d at 1079. (Footnote omitted).

The Louisiana Supreme Court specifically rejected Petitioner's claim that the restrictions imposed would violate his constitutional rights pursuant to the First Amendment to the United States Constitution:

"The restrictions imposed on defendant's display do not contravene his constitutional rights to express his beliefs. Our decree merely places reasonable limitations on the size of the display in order to prevent defendant's expression from infringing on the rights of plaintiff. Plaintiffs' protected rights under C.C. 667-669 justify the limitations on defendant's display.

"In consideration of defendant's right of religious expression, he is free to retain the religious symbols which are included in his display, that is, the Star of Bethlehem, nativity scene, religious tapestry and oversized lighted angels. The limitations on defendant's activity do not extend to the content of the display." Appendix A, *infra*, p. A-20; 475 So.2d at 1080.

Based upon this reasoning, the Louisiana Supreme Court issued the following Decree which Petitioner is now asking this Court to review:

"DECREE

"For the foregoing reasons, the judgment of the court of appeal is reversed. Defendant is enjoined from operating his display in a manner which attracts bumper to bumper traffic and extremely large numbers of visitors to his limited access, residential neighborhood." Appendix A, *infra*, p. A-21; 475 So.2d at 1080.

Justice Blanche concurred in the result, with Reasons indicating his position:

"I would enjoin the entire display, including all of the religious items, and let the defendant proceed at his own risk in the future. It takes no more than a consideration of the feelings and sensibilities of one's neighbors to come up with decorations that do not amount to a nuisance." Appendix A, *infra*, p. A-23;475 So.2d at 1081.

REASONS FOR GRANTING PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ON IMPORTANT ISSUES AFFECTING FEDERAL CONSTITUTIONAL RIGHTS

A. The Louisiana Supreme Court Decision Conflicts with This Court's Decisions in Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) and Others Because its Restriction of Petitioner's Speech Violates Grayned's *Guidelines.*

The First Amendment of the United States Constitution provides in pertinent part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . ."

The First Amendment is applicable to the states, through the Fourteenth Amendment to the United States Constitution. *See, e.g., Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1979)

The court below entered an injunction against Petitioner which limits his speech in a manner which directly conflicts with the guidelines laid down by this Court, and constitutes a dangerous precedent for abridging First Amendment rights.

In the first place, the Louisiana Supreme Court admits in its Opinion that the Petitioner's Christmas decorations represent symbolic speech, which is arguably religious. Symbolic speech is protected speech. See *Tinker v. Des Moines School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (armbands); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) (burning American flag).

Furthermore, although no ordinance or statute is challenged herein, because the Louisiana Supreme Court issued an injunction which Petitioner may not violate upon penalty of being found in contempt of court, this injunction is considered as a prior restraint, and must abide by the same guidelines laid down by this Court with respect to

ordinances. See: *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971); *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971).

A Prior restraint on speech can be allowed only if it is a "reasonable" time, place or manner restriction which is not based on the content or the subject matter of the speech, there is no arbitrary discretion vested in a governmental authority, and the restriction serves a "significant governmental interest." *Grayned v. City of Rockford*, 408 U.S. 104, 115-17, 92 S.Ct. 2294, 2293-04, 33 L.Ed.2d 222 (1972); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 648-49, 101 S.Ct. 2559, 2564-65, 69 L.Ed.2d 298 (1981). The restriction also must leave alternative forms for the expression of the protection speech. *Heffron*, 452 U.S. at 654, 101 S.Ct. at 2567.

Furthermore, the restraint may be sustained only if the government can show that the regulation is a precisely drawn means of serving the compelling state interest. *Consolidated Edition Company v. Public Service Commission*, 447 U.S. 530, 540, 100 S.Ct. 2326, 2335, 65 L.Ed.2d 319 (1980). This means that the government must show that it has employed the means least restrictive of protected First Amendment activity in serving the governmental interests, even if this means is not the most convenient. See: *ACORN v. City of New Orleans*, 606 F.Supp. 16, 23 (E.D.La. 1984). If other means could serve the governmental interests asserted which would be less intrusive on the activity protected by the First Amendment, the restriction on speech must fall. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 70-71, 101 S.Ct. 2176, 2183-84, 68 L.Ed.2d 671 (1981); *Davenport v. City of Alexandria, Virginia*, 710 F.2d 148, 149 (4th Cir. 1983).

In the case at bar, the Louisiana Supreme Court injunction goes further than restricting the time, place or manner in which Petitioner can operate the Christmas display, his form of protected symbolic speech. The District Court and the Court of Appeal had merely restricted the hours and days of operation. However, the Supreme Court specifically limits the speech itself, including its content; it actually mandates what objects can and cannot be displayed at Petitioner's home on Folse Street. Moreover, its restrictions are designed to prevent Petitioner's communicating his speech to the public, and the purpose of the First Amendment is to allow communication.

Finally, the Opinion of the Louisiana Supreme Court makes it clear that the purported nuisance with which it is concerned resulted from the activity of those third parties experiencing and viewing Petitioner's Christmas display, and that the "nuisance" was not the display itself. Nevertheless, the Louisiana Supreme Court specifically rejected the attempts by Jefferson Parish and the lower courts to restrict and regulate the activities of the third parties, rather than to restrict Petitioner's protected speech. The Louisiana Supreme Court clearly ignored the mandates of this Court, and holdings in other courts throughout this country which require states to apply restrictions which are least intrusive on activity or speech protected by the First Amendment; the Supreme Court issued an injunction which was most intrusive.

B. The Decision Below Conflicts with Decisions of This Court which Disallow the Utilization of Nuisance Laws to Prohibit Protected Speech.

The only previous context in which this Court has allowed nuisance laws to be applied to prohibit speech is in the area of obscenity. However, obscenity is unprotected speech. See: *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 69, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973), rehearing denied, 414 U.S. 881, 94 S.Ct. 27, 38 L.Ed.2d 128, 419 U.S. 887, 95 S.Ct. 163 (1973). Even in this context, nuisance laws cannot be applied in such a manner that they result in the suppression of protected non-obscene speech, as well as obscene expression. See: *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), rehearing denied, 361 U.S. 950, S.Ct. 399 (1960).

Furthermore, even where the speech is obscene, nuisance laws cannot be utilized to prohibit an individual's possession of obscene material in his private home. See: *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

The lower court's holding herein represents a dangerous departure from these guidelines set forth by this Court; its application of the nuisance statute herein clearly attacks protected, non-obscene speech, and the protected speech and activity of the Petitioner is taking place at his private residence.

The decision below also raises a serious issue concerning the general use of nuisance laws vis-a-vis free speech. As mentioned above, the purported "nuisance" herein is not Petitioner's speech itself; rather, the purported nuisance arises from the activity of third parties experiencing and viewing Petitioner's display. It is a disturbing precedent to curtail free speech based upon such a purported nuisance. Can one's speech itself ever be restricted

based upon nuisance law [illegible] the purported nuisance arises from the acts of the [illegible] who are only seeking to receive this speech? Petitioner contends that the Constitution does not allow nuisance laws to be so abused.

II. THE PUBLIC IMPORTANCE OF THE ISSUES PRESENTED

The public importance and danger of the precedent if this Court allows the opinion and decree of the Louisiana Supreme Court to stand is clear. In the context of declaring Petitioner's speech a "nuisance," the Louisiana Supreme Court has effectively foreclosed the speech's dissemination. The far-reaching implications of this abuse of nuisance laws are evident.

In New Orleans, for example, Mardi Gras has been celebrated continuously since the mid-1800's. Each year scores of private carnival organizations parade throughout the city congesting the public thoroughfares and attacting huge crowds to otherwise quiet residential neighborhoods. Police supervision is required to provide traffic control, emergency medical assistance, and sanitation and maintenance crews to the affected neighborhoods. Throughout the carnival season, the residents of the impacted neighborhoods are thus required to endure a certain amount of "inconvenience," occasioned by the celebration of these private carnival krewes. Certainly there are many residents in New Orleans, as well as in Mobile, Alabama, and in other places where Mardi Gras is celebrated who consider the celebration as a "nuisance" - yet Mardi Gras has endured.

Sporting traditions also enjoy a rich heritage within Louisiana, as well as within the rest of the nation. Until 1975, thousands of spectators were drawn into a tranquil

uptown New Orleans neighborhood on fall weekends upon the invitation of two private entities - Tulane University and the New Orleans Saints organization - each of which charged admission for those football contests held at Sugar Bowl Stadium. The crowds cluttered the surrounding neighborhood, blocking access to resident's homes, leaving trash and liter on private property, and destroying the otherwise peaceful solitude of the community. Although construction of the Louisiana Superdome eventually relocated these games, these same conditions are repeated each fall weekend at numerous locations throughout the state and the United States. Despite the inherent congestion, disorder and "nuisance" (as defined by the Louisiana Supreme Court) occasioned by these events, they remain an integrated part of this country's social and sporting tradition.

Every day there exists countless less apparent examples of compromise between the enjoyment of private property and the exercise of personal First Amendment freedoms. On Sundays, worshipers ingest streets and neighborhoods surrounding churches, in many instances blocking and limiting access for nearby residents; festivals and state fairs attract crowds to otherwise isolated residential areas, often invoking the irritation and dis- pleasure of residents who do not enjoy the traffic, noise or litter which may accompany such an event. In addition, tens of thousands of Americans every year display Christmas decorations on the outside of their homes, and attract the notice of passersby and visitors. In such cases, it has been the holding and policy of the applicable authorities to abide by the guidelines of this Court, and to strictly apply such restrictions on these forms of speech as are narrowly tailored to maintain public order, and which are least oppressive to protected First Amendment rights. The

The Louisiana Supreme Court has departed from these guidelines. Under the claim of nuisance, the Louisiana Supreme Court has directly restricted protected speech and activity.

Even more odious are the ramifications for potitical speech. Tens of thousands of Americans display political banners, signs and slogans every election campaign; such voicing of opinions with respect to candidates and issues is essential to our democracy, and its protection is mandated by the First Amendment. If the Louisiana Supreme Court's Opinion is allowed to stand, however, if these banners or signs or the political discussions in conjunction therewith attract a crowd, or bumper-to-bumper traffic, then under the guise of nuisance, a state court could restrict this speech; under the guise of nuisance, a state court could restrict any communication with which the judge or judges disagree.

It is therefore essential that this Court speak to enforce those guidelines laid down with respect to the restriction of First Amendment speech, and to set forth a national policy with respect to how nuisance laws can constitutionally interact with protected speech and activity.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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BY: _____
PETER J. BUTLER

COUNSEL FOR
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CERTIFICATE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari has been forwarded to counsel of record, Cecil M. Burglass, Jr., Esquire, by depositing same in the United States mail addresed to him at his office, this ____ day of December, 1985.

PETER J. BUTLER
COUNSEL FOR
PETITIONER,
ALVIN C. COPELAND

APPENDIX A

SUPREME COURT OF LOUISIANA

No. 85-C-0484

HERBERT RODRIGUE, BURTON G. KLEIN
and MARY BORRELL

Versus

ALVIN C. COPELAND and
POPEYE'S FAMOUS FRIED CHICKEN, INC.

On Writ of Certiorari, or Review,
to the Court of Appeal, Fifth Circuit,
Parish of Jefferson, Louisiana.

DIXON, Chief Justice*

Plaintiffs, three residents of the Pontchartrain Shores Subdivision in Jefferson Parish, instituted this action to enjoin defendant, Alvin C. Copeland, from erecting and operating his annual Christmas display. The plaintiffs sought injunctive relief under C.C. 667-669 due to problems associated with an enormous influx of visitors to their limited access, residential neighborhood.

The preliminary injunction was denied by the trial judge on December 15, 1983. After trial of the permanent injunction, the trial court, on August 31, 1984, denied the permanent injunction, but also ordered the defendant to

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* Honorable Henry L. Yelverton served as Justice Ad Hoc in place of Justice Jack Crozier Watson, recused.

limit the exhibition to thirty days and to deactivate the display at 11:00 p.m. nightly. Relief was otherwise denied. The court of appeal affirmed the denial of injunctive relief and further held that the trial court's restrictions were not obligatory on the defendant, but were "parameters" within which defendant could "operate", but "if he operates outside of those parameters, his display could be . . . declared a nuisance in fact and, hence, abated." Rodrigue v. Copeland, 465 So.2d 67, 72 (La. App. 1985).

Since 1977 defendant has annually maintained a Christmas display on his premises at 5001 Folse Drive. The display has grown in size and popularity since the year of its inception. The display consists of an extravagant array of lights and lighted figures accompanied by traditional Christmas music.

The neighborhood is a limited access area which is zoned solely for single family residences. Defendant's premises, which front on Folse Drive, are bounded to the north by the Lake Pontchartrain levee, to the east by a public right-of-way and to the west by the residence of plaintiff Mary Borrell. (See appendix for map of the neighborhood).

Since 1982 defendant's exhibition has drawn numerous spectators to the neighborhood during the hours while the display is in operation. The spectators view the display either from their automobiles or on foot after parking their vehicles in the surrounding neighborhood. The increased congestion in the neighborhood has created numerous problems for some of the defendant's neighbors such as restricted access to their homes, noise, public urination, property damage and a lack of on street parking.

The plaintiffs[1] commenced the present action on November 30, 1983. They prayed for an injunction restraining defendant or his agents from erecting or activating the display.

On December 1 the Parish of Jefferson also sought injunctive relief to prevent Copeland from maintaining his display. The parish alleged that defendant was in violation of the Jefferson Parish Code of Ordinances and the Comprehensive Zoning Ordinance. The primary basis for this suit was the alleged presence of decorations and other structures on parish property adjoining 5001 Folse Drive.

The two suits were consolidated and a hearing was set for December 6, 1983. Prior to the hearing, the trial judge visited the site of the display on December 3. On that same day a pretrial conference, attended by counsel and two representatives of the Jefferson Parish Sheriff's Office, was held at the home of the trial judge.

The hearing on the preliminary injunction commenced on December 6, 1983. Harry Lee, the Sheriff of Jefferson Parish, testified that his office had devised a plan which would facilitate a smoother flow of traffic in the neighborhood. The plan was to go into effect each night while the display was in operation. Under the plan, the traffic was to be directed down Transcontinental Drive in a northerly directon toward the display. The right-hand, northbound lane of Transcontinental was to be blocked off and reserved for use by emergency vehicles. Once the automobiles reached the intersection of Folse and Transcontinental, they would be required to turn left on

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[1]Herbert Rodrigue, Burton G. Klein and Mary Borrell.

Folse or make a U-turn onto the southbound lanes of Transcontinental. Under the plan, Folse was to be redesignated as a westbound, one-way street and westbound vehicles on Folse were to be permitted to pass in front of the display.

The sheriff testified that the plan would require the services of seven deputies. Two of the deputies were to patrol the Transcontinental neutral ground on horseback while the others were to direct traffic. Two or three portable toilets were to be placed on the neutral ground in order to control the problem of urination on property of nearby residents. Two motor scooters were to be stationed at the site for use in medical emergencies.

The sheriff also testified that residents of the area would be given identification placards which, upon being displayed to on duty deputies, would allow them to obtain access to their homes. In order to combat the litter problem, the sheriff suggested the deployment of prison "trustees" to pick up trash each morning. He also contemplated the use of a forty passenger bus to transport visitors to and from the display.

Katherine Knight, a practicing pediatrician and director of pediatrics at Charity Hospital, testified that she resides at 4624 Transcontinental, three blocks from the display. She stated that the southbound traffic on Transcontinental was constant and speedy while the exhibition was in operation. She claimed that her driveway had been obstructed by the autos of visitors to the site and she had trouble backing out of her driveway. On one occasion, while she was "on call," it took her an additional thirty minutes to reach Charity Hospital as a result of the traffic. She also complained that her own Christmas displays

were stolen and her family was constantly harrassed by people wishing to use the facilities in her home. Finally, she expressed regret that her children were unable to have their friends over during the Christmas season due to the traffic.

The hearing was recessed and continued until December 13. In the interim, on December 10, the plan delineated by the sheriff went into effect. Upon resumption of the hearing on December 13, Colonel Roy Jacobs testified regarding the effectiveness of the plan. He stated that since the plan went into effect, traffic moved more smoothly and there had been no reports of trash or drunkenness. However, according to Jacobs, the traffic was very heavy on Saturday, December 10.

The plaintiffs and two other witnesses testified regarding the damage and inconvenience caused by the display. They testified that the traffic was very heavy even after implementation of the sheriff's plan. Burton Klein and Edward Hernandez both testified that they spent an inordinate amount of time getting home from work as a result of the traffic. Klein testified that the westbound traffic on Folse Drive had been backed up as far as Clearview, thirteen blocks from the display.

According to Hernadez, who resides at 4733 Transcontinental Drive, he has spent fifteen minutes getting out of his driveway during the peak hours of traffic. Klein and Hernadez also testified that they were unable to have friends over or have parties since access to their houses was limited and parking was not available. The witnesses also complained of loud noises from a combination of sources such as the crowd in front of defendant's house, music from his loudspeakers, slamming of car doors and car horns.

Klein testified that the exhibition and the crowds created a "carnival atmosphere." Hernandez stated that in past years vendors had sold cotton candy and Christmas trinkets at the display site. Borrell, Copeland's next door neighbor, stated that she can hear defendant's Christmas music while inside her home.

Roy Easley of 4964 Folse Drive testified regarding a five minute video tape of the display taken by him. The tape, which was admitted into evidence, was taken on Saturday night December 10, Sunday night December 11, and Tuesday morning December 13. The nighttime portions of the video depicted bumper to bumper traffic moving at a very slow pace. The sheriff's plan was in effect at the time of the video as is evidenced by the presence in the video of a portable toilet and mounted deputies, both located on the neutral ground of Transcontinental.

The defendant testified that the display is normally activated in early December and it is dismantled on or about January. 5. The display is activated at dusk and it normally remains in operation until 11:00 p.m. on weekdays and 12:00 o'clock midnight on weekends. He admitted that on occasion the display may have been activated past midnight. During the past few years, the display's cost of $30,000 to $50,000 has been borne entirely by defendant's business, A. Copeland Enterprises, Inc.

Defendant called five residents of the neighborhood who testified that the display was not unpleasant and the traffic situation was much improved since institution of the sheriff's plan. Ben Montalbano of 4924 Folse Drive testified that the heavy traffic lasted for only one hour. He claimed that prior to institution of the traffic plan he was concerned about the traffic, but that his apprehensions had

been allayed by the plan. Rosemary Wyman of 4920 Folse testified that she was in favor of the display, but on cross-examination she admitted that the traffic on Transcontinental was backed up beyond West Esplanade on one occasion.

Colonel Jacobs was called back as a witness and he testified that the sheriff's traffic plan was instituted on Saturday, December 10, 1983. He claimed that problems with the plan would be corrected as they became evident. On cross-examination Jacobs testified that the sheriff's responsibility was restricted to traffic control and he was unable to alleviate problems such as the inability of the nearby residents to have their family and friends over during the holidays. Jacobs also stated that the plan was designed to control traffic and that it did not facilitate any reduction in the number of vehicles attracted to the area.

Based on the foregoing testimony, the trial judge denied the request for a preliminary injunction. The court cited C.C. 667-669 and found that the display was a mere inconvenience which was subject to regulation by the "rules of the police." C.C. 669. Plaintiffs sought remedial writs from the court of appeal and from this court, without success.

The trial of the permanent injunction was held on July 31, 1984. The record from the preliminary injunction was admitted into evidence and additional testimony was taken.

Colonel Jacobs testified that under the sheriff's plan, the traffic flowed smoothly. However, he estimated that more vehicles were able to reach the display after the plan went into effect. He also stated that it took three to five days to effectively implement the plan.

Two witnesses testified that the traffic was less of a problem after December 10, 1983. Ben Montalbano stated that he had no trouble backing his car onto Folse Drive. Vicent Maenza stated that the traffic was ninety percent better with the presence of the sheriff's deputies. Defendant offered to produce six additional witnesses who would testify similarly to Montalbano and Maenza, but the trial judge stated that such testimony would add nothing to defendant's case.

Burton Klein, one of the plaintiffs, testified that the sheriff's plan merely exacerbated the existing problem. According to Klein, the noise level was increased due to the presence of the sheriff's deputies who blew whistles and used amplifiers in directing the traffic. Also, he claimed that the noise from the traffic itself was greater because the plan facilitated the passage of more vehicles in front of the display. Finally, he contended that under the plan he did not have greater access to his house nor was he able to leave his home without great inconvenience.

After trial, the court granted limited injunctive relief, directing Copeland to limit his display to thirty days, commencing the first Saturday in December, and ordering him to turn off the display at 11:00 p.m., nightly. The court also permanently enjoined defendant from using the public property adjacent to his premises for any purpose. Injunctive relief was otherwise denied.

All parties except for the Parish of Jefferson appealed. The court of appeal affirmed the district court's denial of injunctive relief. Rodrigue v. Copeland, supra. Furthermore, the court held that the restrictions imposed by the district court on the time and duration of the display did not have the force and effect of a court order. Instead the court concluded that the restrictions were merely ". . . parameters within which the court would not find the display to be a nuisance in fact." 465 So.2d at 72.

Plaintiffs now seek reversal of the court of appeal judgment. They contend that they are damaged by the display and are therefore entitled to have it abated. Plaintiffs maintain that the sheriff's traffic control plan exacerbates the problem by accelerating the flow of traffic and thereby attracting more traffic to the area. They also maintain the court of appeal erred in finding that the restrictions imposed by the trial court did not have the force and effect of a court order. Finally, plaintiffs contend that the lower courts erred in failing to find that defendant's display constitutes a commercial use of his premises in violation of the Jefferson Parish Comprehensive Zoning Ordinance.

Defendant argues that his display is, at most, an inconvenience to the plaintiffs. He maintains that he may not be held accountable for damage occasioned by visitors attracted to the display. Finally, defendant argues that any limitation upon his display would be unconstitutional since his rights of free speech and religious expression would be abridged.

ISSUES

I. Whether defendant's display constituted a

commercial use of his premises such that he is in violation of the Jefferson Parish Comprehensive Zoning Ordianance.

II. Whether plaintiffs are entitled to injunctive relief under the obligations of neighborhood imposed by Civil Code articles 667-669.

III. Whether the imposition of injunctive relief would infringe on defendant's constitutional freedoms of religious expression and speech.

COMMERCIAL USE

Plaintiffs contend that defendant's exhibition constitutes a commercial use of his premises in violation of the Jefferson Parish zoning ordinance. The neighborhood is zoned solely for residential use. Plaintiffs support their allegation with defendant's testimony that the cost of the display, $30,000-$50,000, has been borne by his business, A. Copeland Enterprises, Inc., since 1980. Defendant owns 100% of the stock in A. Copeland Enterprises, Inc. This corporation is the parent company of Popeye's Famous Fried Chicken, Inc.

Richard Tatalluto, the assistant comptroller of A. Copeland Enterprises, testified that the costs of the display are handled as a business expense of the company. He also stated that although he does not prepare the tax returns he was aware that the company deducted its business expenses for tax purposes. Further support for plaintiffs' allegation is found in Burton Klein's testimony that he had observed, on television, a Popeye's sign which was located in the front yard of defendant's home.

Defendant maintains that his display is not an

advertisement, but rather that it is intended simply as his personal expression of the spirit and meaning of Christmas. He contends that he immediately removed a small Popeye's Famous Fried Chicken sign from his front yard on one occasion several years prior to the suit. According to Copeland the sign had been placed upon the premises without his consent by his advertising department and it remained on his premises for just one day.

The Comprehensive Zoning Ordinance for Jefferson Parish[2] generally restricts the use of property zoned "R-1 residential" to non-commercial uses. If defendant's display was primarily intended to promote his commercial enterprises, it would be prohibited.

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[2]The Comprehensive Zoning Ordinance for Jefferson Parish provides, in part:

"SECTION VII - SINGLE FAMILY RESIDENTIAL DISTRICT - R-1

1. DESCRIPTION:

> This district is composed of certain lands and structures having a low density, single family residential character and additional open area where it is desirable and likely that such similar development will occur. Uses are limited to single family residences and such non-residential uses as are intended primarily to provide service to the adjacent neighborhood.

2. PERMITTED USES:

> In R-1 Districts only the following uses of property shall be permitted:
>
> A. Single Family dwellings.
>
> . . ."

An exhaustive list of permissible uses follows the above stated portion of the zoning ordinance. None of the permissible uses, therein listed, appear applicable to the present case.

Our analysis of the facts and law lead us to affirm the lower courts' finding that the display did not constitute a commercial use of defendant's property. Therefore, defendant's display is not barred by the zoning ordinance.

Although the expenses of the display have been borne by defendant's business, the lower courts reasonably could have concluded that the display was intended primarily for defendant's personal satisfaction. The display is temporary in nature. With the exception of one day, several years prior to this suit, it has not included any reference to his business interests. The evidence does not indicate that the display has been used in any media advertisements of defendant's business. Based on these facts, the lower courts could conclude that the display did not constitute a commercial use of his premises.

OBLIGATIONS OF NEIGHBORHOOD (C.C. arts. 667-669)

Owners of immovable property are restrained in the use of their property by certain obligations. These obligations include the responsibilities imposed by articles 667-669 of the Civil Code:

> "Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him." C.C. 667.

> "Although one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet every one has the liberty of doing on his own ground

whatsoever he pleases, although it should occasion some inconvenience to his neighbor.

Thus he who is not subject to any servitude originating from a particular agreement in that respect, may raise his house as high as he pleases, although by such elevation he should darken the lights of his neighbors's [neighbor's] house, because this act occasions only an inconvenience, but not a real damage."
C.C. 668.

"If the works or materials for any manufactory or other operation, cause an inconvenience to those in the same or in the neighboring houses, by diffusing smoke or nauseous smell, and there be no servitude established by which they are regulated, their sufferance must be determined by the rules of the police, or the customs of the place." C.C. 669.

These obligations of vicinage are legal servitudes imposed on the owner of property. These provisions embody a balancing of rights and obligations associated with the ownership of immovables. As a general rule, the landowner is free to exercise his rights of ownership in any manner he sees fit. He may even use his property in ways which ". . . occasion some inconvenience to his neighbor." However, his extensive rights do not allow him to do "real damage" to his neighbor.

At issue in this case is whether Copeland's light and sound display has caused a mere inconvenience or real damage to his neighbors and their right to enjoy their own premises.

In determining whether an activity or work

occasions real damage or mere inconvenience, a court is required to determine the reasonableness of the conduct in light of the circumstances. This analysis requires consideration of factors such as the character of the neighborhood, the degree of the intrusion and the effect of the activity on the health and safety of the neighbors.

In the past, this court has borrowed from the common law of nuisance in describing the type of conduct which violates the pronouncements embodied in C.C. 667-669. In Robichaux v. Huppenbauer, 258 La. 139, 150, 245 So.2d 385, 389 (1971), we considered whether a horse stable located in the City of New Orleans, could be abated under C.C. 669. We stated the following test:

> "Thus noxious smells, rats, flies and noise may constitute an actionable nuisance although produced and carried on by a lawful business, where they result in *material injury to neighboring property or interfere with its comfortable use and enjoyment by persons of ordinary sensibilities.* McGee v. Yazoo & M.V.R. Co., 206 La. 121, 19 So.2d 21 (1944)." (Emphasis added).

This test has also been applied by the courts of appeal: McCastle v. Rollins Environmental Services of Louisiana, Inc., 415 So.2d 515, 519 (La.App. 1st Cir. 1982) ("... whether the alleged nuisance produces serious or material discomfort to persons of ordinary sensibilities in a normal state of health."). Allen v. Paulk, 188 So.2d 708, 709 (La. App. 2d Cir. 1966) ("... whether the alleged nuisance produces such a condition as, in the judgment of reasonable men, naturally produces actual physical discomfort to normal persons of ordinary sensibilities, tastes, and habits.").

Although the common law of nuisance has no

binding, precedential value in the courts of this state, that body of law does correspond to some extent with the obligations of neighborhood established by C.C. 667-669. Therefore, the analysis employed by the courts of our sister states has been useful as persuasive authority regarding the application of our law.

In Hero Lands Co. v. Texaco Inc., 310 So.2d 93, 98 (La. 1975), we recognized that the prohibitions contained in C.C. 667-669 were not limited to the physical invasion of neighboring premises. According to the court:

> ". . . The damage may well be intrinsic in nature, a combination of facts and conditions which, taken together, do not involve a physical invasion but which, under the circumstances, are nevertheless by their nature the very refinement of injury and damage." (Citations omitted).

Since plaintiffs seek injunctive relief, they must prove irreparable injury in addition to the necessary showing of real damage under C.C. 667-669. C.C.P. 3601; Salter v. B.W.S. Corp., Inc., 290 So.2d 821 (La. 1974); Hilliard v. Shuff, 260 La. 384, 256 So.2d 127 (1972). Applying the foregoing principles to this case, we conclude that defendant's display has occasioned real damage, not mere inconvenience, upon plaintiffs. Likewise, we conclude that plaintiffs will be irreparably harmed unless injunctive relief is granted.

Defendant's exhibition constitutes an unreasonable intrusion into the lives of his neighbors when considered in light of the character of the neighborhood, the degree of the intrusion and its effect on the use and enjoyment of their properties by his neighbors.

The record demonstrates that the affected area is a single family residential neighborhood. Access to the neighborhood is restricted to residential streets and Transcontinental Drive, a divided paved thoroughfare which ends at Folse Drive, just to the east of defendant's residence. There is no access to and from defendant's premises from the north since the Lake Pontchartrain levee is located immediately to the rear of the lots fronting on Folse Drive.

The damage suffered by plaintiffs during the operation of defendant's display is extensive, both in terms of its duration and its size. Defendant's display becomes operative in early December and remains in operation until January 5. During this period, plaintiffs are forced to contend with a flow of bumper to bumper traffic through their limited access neighborhood. In addition, they must endure the noise and property abuse associated with the crowd of visitors who congregate near the display.

The display begins operation at dusk each evening and continues until 11:00 p.m. on weekdays and 12:00 midnight on weekends. The display is occasionally operational beyond midnight. While in operation, it features an extravagant display of lights which are located across the front of defendant's residence, on the roof and in the enclosed yard to the west of the residence. Some of the lights comprising the display are shaped into figures such as a star, a reindeer, a snowman, three angels and a depiction of Santa and his reindeer. Lights are also located in the trees and shrubs. In addition to the lights, the display features a tapestry proclaiming "Glory to God in the Highest" and a creche.

Noise emanates from the display and from the

visitors. The display is accompanied by traditional Christmas music which is amplified through loudspeakers located on the second floor of defendant's residence. The music is audible inside the home of Mary Borrell. The plaintiffs also complain of noise emanating from car engines, car horns, the slamming of car doors and police whistles.

The record clearly indicates that traffic in the neighborhood is congested due to the slow progress of vehicles carrying spectators by the display. The traffic has seriously impaired the ability of plaintiffs to gain access to and from their premises. Furthermore, on street parking for plaintiffs or their guests becomes virtually nonexistent. As a result of the traffic congestion and lack of parking, plaintiffs and children of defendant's neighbors cannot have their own Christmas celebrations and gatherings.

Defendant contends that the sheriff's traffic plan has minimized any damage to the plaintiffs. Although the plan has facilitated a smoother (quicker) flow of traffic, the remaining problems still exist. The plaintiffs still experience extended delay in reaching and leaving their premises. The noise associated with the display and the crowds remains. Furthermore, the duration of the display has been unaffected by the plan.

The increased traffic attracted to the display has some impact on the health and safety of the residents. The response time for emergency services is increased due to the traffic congestion. However, the record indicates that this danger was minimized under the sheriff's plan through the creation of an emergency lane on Transcontinental and the presence of two motor scooters to be used in medical emergencies. If the physical health and safety of the

plaintiffs had been the only factor to consider, we would not have deemed it necessary to restrain defendant's display. However, in consideration of all the factors, the district court committed clear error in failing to find that plaintiffs suffered damage under C.C. 667-669 and irreparable injury. Likewise, the court of appeal erred in affirming the district court.

Plaintiffs' injury stems from the nature and size of the display which render it incompatible with a restricted access, residential neighborhood. Defendant is enjoined from erecting and operating a Christmas exhibition which is calculated to and does attract an unusually large number of visitors to the neighborhood.

In complying with our order, defendant is specifically enjoined from placing oversized lighted figures, such as the reindeer and snowman, in his yards or upon the roof of his residence.[3] The proper place for these "commercial size" decorations is not within a quiet, residential neighborhood. Defendant is also specifically ordered to reduce the volume of any sound accompanying the display so that it is not audible from within the closest homes of his neighbors.

In limiting his display, the burden is placed on defendant to reduce substantially the size and extravagance of his display to a level at which it will not attract the large crowds that have been drawn to the neighborhood in the past.

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[3] In deference to defendant's right of religious expression, discussed in the final portion of this opinion, he is permitted to retain the lighted star and angels.

Of course, defendant is free to maintain his display unrestricted, at a location which is appropriate. The injunction granted herein is limited to activity at defendant's premises on Folse Drive.

CONSTITUTIONAL ISSUES

Defendant contends that injunctive relief affecting his display would infringe on his constitutional freedoms of speech and religious expression. Defendant places emphasis on the religious character of his display, claiming that the display as a whole is intended as part of his celebration of the birth of Christ. In his brief, defendant emphasizes that his display includes a creche (nativity scene),[4] angels, a religious tapestry and a Star of Bethlehem.

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freeedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The corresponding provisions of the Louisiana Constitution, located in Article 1, §§ 7 and 8 provide:

"Section 7. No law shall curtail or restrain the freedom

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[4]Defendant purchased the nativity figures on December 2, 1983, three days after plaintiffs' suit was filed and one day after suit was filed by the Parish of Jefferson. At trial, he maintained that the figures were not purchased as a result of this lawsuit.

of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom.

"Section 8. No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof."

The First Amendment and the constitutional provisions of this state do not guarantee the absolute right to express one's views at any time and in any manner. Reasonable time, place and manner restrictions may be applied to the expression of one's views where a significant governmental interest is served and the restrictions are not based on the content of the views expressed. Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981); Consolidated Edison Co. of New York v. Public Commission of New York, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980).

The restrictions imposed on defendant's display do not contravene his constitutional right to express his beliefs. Our decree merely places reasonable limitations on the size of the display in order to prevent defendant's expression from infringing on the rights of plaintiffs. Plaintiffs' protected rights under C.C. 667-669 justify the limitations on defendant's display.

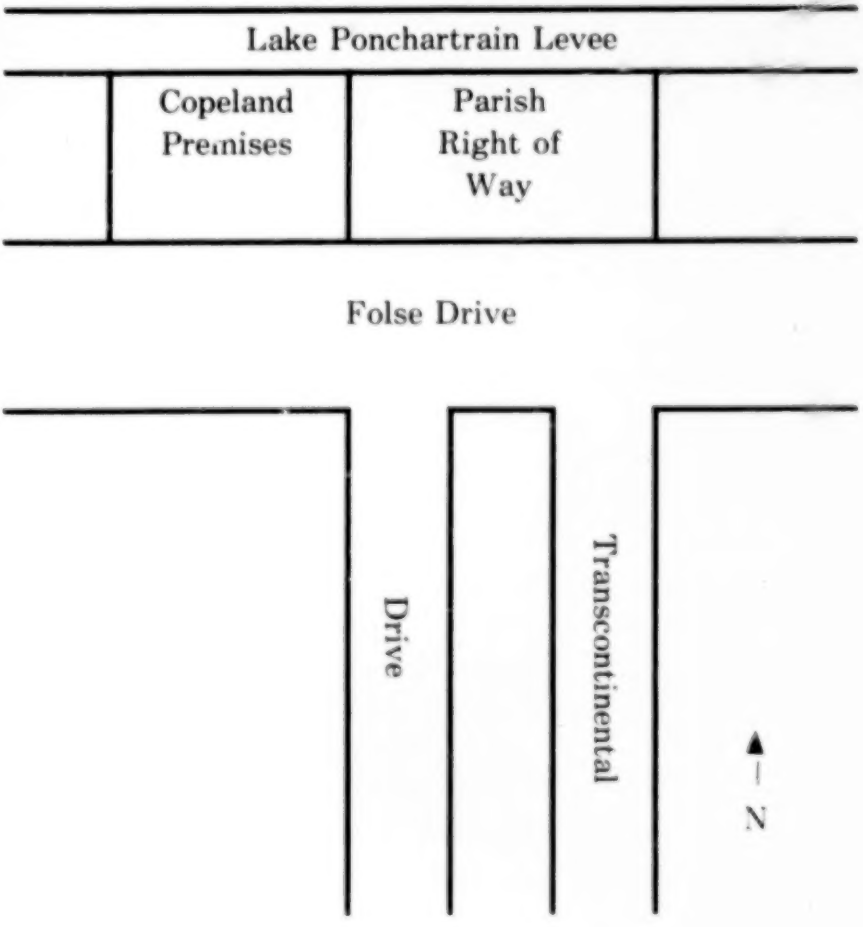
In consideration of defendant's right of religious expression, he is free to retain the religious symbols which are included in his display, that is, the Star of Bethlehem, nativity scene, religious tapestry and oversized lighted angels. The limitations on defendant's activity do not extend to the content of the display.

DECREE

For the foregoing reasons, the judgment of the court of appeal is reversed. Defendant is enjoined from operating his display in a manner which attracts bumper to bumper traffic and extremely large numbers of visitors to his limited access, residential neighborhood.

APPENDIX

Map of Ponchartrain Shores Subdivision near the display:



SUPREME COURT OF LOUISIANA

NO. 85-C-0484

HERBERT RODRIGUE, BURTON G. KLEIN
and MARY BORRELL

versus

ALVIN C. COPELAND and
POPEYE'S FAMOUS FRIED CHICKEN, INC.

BLANCHE, J. (concurring)

I respectfully concur and join with the majority in finding defendant's Christmas display a nuisance. However, this writer would prefer not to tell the defendant what he could or could not display. I would enjoin the entire display, including all of the religious items, and let the defendant proceed at his own risk in the future. It takes no more than a consideration of the feelings and sensibilities of one's neighbors to come up with decorations that do not amount to a nuisance.

APPENDIX B

TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 289-098
c/w 289-142 DIVISION "K"

HERBERT RODRIGUE, BURTON G. KLEIN
AND MARY BORRELL

VS.

ALVIN C. COPELAND AND POPEYE'S FAMOUS
FRIED CHICKEN, INC.

Filed: December 15, 1983 s/s Karen McEvers
DEPUTY CLERK

J U D G M E N T

This matter came for hearing on December 6, 1983, tried and continued as an open case until December 13, 1983 and submitted on briefs.

PRESENT: Cecil M. Burglass
Attorney for Plaintiffs

Louis G. Gruntz, Jr.
Attorney for Parish of Jefferson

Peter J. Butler
Attorney for Defendant

When after hearing all the evidence and reviewing the documents presented herein;

IT IS ORDERED, ADJUDGED AND DECREED that the Writ for Preliminary Injunction is denied at plaintiffs' costs. The Sheriff's rules will control the hours of operation.

JUDGMENT READ, RENDERED AND SIGNED IN GRETNA, LOUISIANA THIS 15th DAY OF DECEMBER, 1983.

/s/ Alvin Rudy Easton

JUDGE

APPENDIX C

TWENTY–FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 289-098
c/w 289-142 DIVISION "K"

HEBERT RODRIGUE, BURTON G. KLEIN AND MARY BORRELL

VS.

ALVIN C. COPELAND AND POPEYE'S FAMOUS FRIED CHICKEN, INC.

****

REASONS FOR JUDGMENT

****

This case is an injunction proceeding filed by the individual plaintiffs who are residents, residing within a very short distance of the residence of the defendant, Alvin Copeland. The defendant, Alvin Copeland, each year erects a large Christmas light display, on his lawn, which attracts large numbers of people to see the display.

The plaintiffs contend that these people who drive by create traffic jams, park illegally, litter their property and urinate publicly on their property. That the massive congestion will delay emergency services which creates a real danger to them. Further, they contend that this is a commercial venture on the part of Copeland. They seek an injunction enjoining defendant Copeland from lighting the Christmas lights on his front/side lawn. Additionally, the defendant is alleged to have installed loud speakers which

produce sound every night from dusk until 11:00 a.m. or thereafter.

The defendant contends in addition to denying the allegations of the petition for injunction that the problems about which the plaintiffs complain are things done by 3rd parties unnamed (apparently the general public), and that the Christmas lights in and of themselves create no nuisance, that the said lights are representative of the defendant's religious beliefs and cannot be enjoined, and that laches have attached since these have been used for several years without legal action.

The evidence shows that the Sheriff on the Parish of Jefferson has instituted traffic controls which ease considerably any traffic congestion and controls parking. That under his plan emergency vehicles such as a fire truck could be gotten into the area without unseeming delay. The Sheriff indeed has two (2) miniambulances patrolling the area to reduce the possibility that some health emergencey can be given priority treatment.

The testimony of the plaintiffs' witnesses did not prove more likely than not that they were "captives" in their own homes. The most plausable complaint shown by the testimony was to the effect that they were precluded by the traffic from having Christmas parties. It appears the Sheriff's Office has devised a system to aid in easing this inconvenience and as long as the Sheriff can handle this, there is no nuisance. Therefore, the Sheriff's rules will control the hours of operation.

The La. Civil Code articles applicable are 667, 668 and 669 and the legal scholars F. Stone and Yanninopolis in their law review articles spoke of the abuse of the right

of ownership. The Court finds no abuse of ownership by the defendant Copeland. He has agreed to lower the volume of the music.

Most of the witnesses agreed that the lights were beautiful and pleasing. The plaintiff, Klein, testified that media coverage has caused an increase in the number of visitations by the general public. The evidence does not show a nuisance, but a mere inconvenience, which under the provisions of Article 669 of La. Civil Code can be controlled by the rules of the police.

The traffic situation generally in Jefferson Parish is heavily congested and the fact that traffic congestion needs police control in the area is clearly akin to the traffic congestion created by parades at Carnival which cause similar inconvenience to citizens throughout the parish and certainly is one of the "customs of the place".

There has been no showing of commercial activity on the part of the defendant Copeland.

The other defendant Popeyes's Famous Fried Chicken, Inc. is dismissed since there is no showing in the evidence that it is involved in the light display. Defendant Copeland owns the property and his wholly owned corporation pays the cost of the lights which lights are deemed not to be a nuisance which should be abated by an injunction.

Accordingly, the Writ of Preliminary Injunction is denied.

Gretna, Louisiana this 15th day of December, 1983.

/s/ Alvin Rudy Eason

JUDGE

APPENDIX D

HEBERT RODGIGUE . NO. 83-C-855
BURTON G. KLEIN . COURT OF APPEAL
and MARY BORRELL . FIFTH CIRCUIT
STATE OF LOUISIANA

versus

ALVIN C. COPELAND and
POPEYE'S FAMOUS FRIED CHICKEN

ON APPLICATION FOR SUPERVISORY WRITS

Herbert Rodrigue, Burton G. Klein and Mary Borrell request us to exercise our extraordinary supervisory authority in lieu of appeal from a decision refusing to grant them a preliminary injunction, enjoining defendant Alvin C. Copeland and Popeye's Famous Fried Chicken "from proceeding further to erect, use, electrify or activate the lights and sound display at the premises at 5001 Folse Drive, Jefferson Parish, Louisiana." We deny the application for the following reasons.

The only issue before us is a preliminary injunction and not the merits of a permanent injunction. The injunction sought is basically in the nature of a conservative writ to maintain the status quo during the proceedings, i.e. to stop the erection, with apparently an extension of that to enjoin the operation of the Christmas display. As to the construction issue, it is apparent that the display has been erected and in use, and a temporary injunction is no longer feasible or available to stop construction.

As to the operation of the display, a more difficult issue is presented. We do not have before us the transcript

of the hearing nor do we have the rules under which the display is operated, but the showing made does inform us that there is a Jefferson Parish ordinance regulating such a display and requiring a permit for the erection of such display. The defendant has obtained a permit under the ordinance. The complaints of the applicants fall basically into two categories. One is the sound or noise created by the display and the other is the activities of the persons who visit the display, who allegedly cause traffic congestion, illegal parking, littering, etc. Considering the allegations of the application and the response thereto, together with the detailed reasons of the trial judge, it appears that there is insufficient basis to cause us to exercise our supervisory jurisdiction on the ruling made. While the allegations of the nature of the operation at times prior to supervision by the Sheriff's office seemed to be well founded, nevertheless the trial judge concluded that the situation, under supervision by the sheriff, has been reduced to inconvenience, not nuisance. These rules apparently relate to traffic control, moderate sound, and reasonable hours of display. The issue of the Sheriff's participation in the enforcement of these rules is not before us. Under the facts found by the trial judge, it does not appear that he has exceeded his discretion in his resolution of the preliminary injunction.

As to those facts urged by appellants that the defendant has exceeded the limitations considered by the trial court since the trial of this matter, we do not consider them because the proper forum for such issues is another application for preliminary injunction or trial on the merits of the permanent injunction. Accordingly, the application for supervisory writs is denied.

Gretna, Louisiana
December ,1983

/s/ John C. Boutall

JUDGE JOHN C. BOUTALL

JUDGE FRED S. BOWES

/s/ Edward A. Dufresne, Jr.

HEBERT RODRIGUE,
BURTON G. KLEIN
and MARY BORRELL

NO. 83-C-855
COURT OF APPEAL
FIFTH CIRCUIT
STATE OF LOUISIANA

Versus

ALVIN C. COPELAND and
POPEYE'S FAMOUS FRIED
CHICKEN

ON APPLICATION FOR SUPERVISORY WRITS

BOWES, J. CONCURRING

I concur with the result reached by Judges Boutall and Dufresne in their decision denying relator's request that we exercise our supervisory jurisdiction in this matter.

I further agree with their conclusion that the issue regarding the construction of the Christmas display of respondent is moot as this has already been accomplished.

I also agree with their observation that the trial judge did not abuse his discretion in refusing to issue a preliminary injunction because he concluded "that the situation under the supervision by the sheriff has been reduced to inconvenience, not nuisance."

However, they also observed that "these rules (of the sheriff) apparently related to traffic control, moderate sound and reasonable hours of display" and that "the issue of the sheriff's participation in the enforcement of these rules is not before us."

While the last statements quoted immediately above appear to be correct, it is my opinion, from reading the district judge's Reasons for Judgement, that these are the sole reasons why the trial judge concluded as he did. He states "it appears the sheriff's office has devised a system to aid in easing this inconvenience and as long as the sheriff can handle this, there is no nuisance. Therefore, the sheriff's rules will control the hours of operation." He further states, "the court finds no abuse of ownership by the defendant Copeland [because] he has agreed to lower the volume of the music."

Accordingly, since the district judge's refusal to issue an injunction apparently hinged on the above, it is my opinion that only as long as the present controls of traffic, moderate sound and reasonsable hours of display instituted by the sheriff, and apparently agreed to by Copeland, continue in effect and the letter and spirit of the judgment are obeyed, I find no abuse of discretion by the district court and fine no reason to exercise our supervisory jurisdiction.

However, should the controls lessen, cease or not be obeyed, it is possible, and even probable, that an actionable nuisance could result and relator's may again apply immediately to the district court and, subsequently, to this court, for relief.

/s/ Fred S. Bowes

Judge Fred S. Bowes

APPENDIX E

The Supreme Court of the State of Louisiana

HEBERT RODRIGUE, BURTON G. KLEIN
AND MARY BORRELL

VS NO. 83-CC-2642

ALVIN C. COPELAND AND
POPEYE'S FAMOUS FRIED CHICKEN, INC.

- - - - -

In Re: Herbert Rodrigue, Burton G. Klein, and Mary Borrell, applying for Supervisory Writs to the Court of Appeal, Fifth Circuit, No. 83-C-855; 24th Judicial District Court for the Parish of Jefferson, No. 289-098, C/W 289-142.

- - - - -

January 16, 1984

Denied. The matter is not moot, and as the Court of Appeal points out, plaintiff may proceed to trial on the merits for a permanent injunction.

JAD
PFC
WFM
JLD
FAB
HTL

WATSON, J., would simply deny the writ application.

Supreme Court of Louisiana
January 16, 1984

/s/ not readable

Clerk of Court
For the Court

APPENDIX F

TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

No. 289-098 DIVISION "K"
c w 289-142

HERBERT RODRIGUE, BURTON G. KLEIN
AND MARY BORRELL
VS.
ALVIN C. COPELAND AND POPEYE'S FAMOUS
FRIED CHICKEN, INC.

FILED: AUGUST 31, 1984 /s/ KAREN McEVERS

JUDGMENT

This matter came for hearing on this 31st day of July, 1984 on the trial on the merits, and submitted on briefs.

PRESENT: Cecil Burglass, Jr.
Attorney for Plaintiff

Peter J. Butler
Attorney for Defendant, Alvin
C. Copeland and Popeye's
Famous Fried Chicken, Inc.

Louis Gruntz
Attorney for Parish of
Jefferson

When after hearing all the evidence and reviewing the documents presented herein:

IT IS ORDERED, ADJUDGED AND DECREED that the permanent injunction is denied and the defendant Alvin C. Copeland is directed to limit the lighting of his display to 30 days commencing the lst Saturday in December and ordering the lights and music to be turned off at 11:00 p.m. each night.

JUDGMENT READ, RENDERED AND SIGNED IN GRETNA, LOUISIANA THIS 31st DAY OF AUGUST, 1984.

/s/ Alvin Rudy Eason

JUDGE

APPENDIX G

TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 289-098 DIVISION "K"
c/w 289-142

HERBERT RODRIGUE, BURTON G. KLEIN
AND MARY BORRELL

VS.

ALVIN C. COPELAND AND POPEYE'S FAMOUS
FRIED CHICKEN, INC.

Filed: August 31, 1984 /s/ Karen McEvers

REASONS FOR JUDGMENT

This case has been previously tried as the plaintiffs sought a preliminary injunction which was denied by this Court. The plaintiff sought writs from the Louisiana Fifth Circuit Court of Appeal which denied the writ for the reasons assigned. The Louisiana Supreme Court denied writs advising that the plaintiff had a right to the trial of the permanent injunction and a trial of the merits on the permanent injunction was held on July 31, 1984.

At the trial on the permanent injunction, the plaintiff put on two (2) witnesses one Col. Roy Jacob of the Jefferson Parish Sheriff's Office who was questioned concerning the traffic plan, and one of the plaintifs Mr. Burton Klein. Mr. Klein testified that the traffic control created noises, whistles, amplified police orders from their cars, a bull horn, and that the traffic flowed smoothly. Further, he testified that ingress and egress to his home via the public

streets was extremely difficult. Finally, the plaintiff, Klein testified "I don't like the display because of the problems it causes me, but as far as the display, if it were someplace else, I would probably go and visit it"

This testimony goes to the ultimate issue in this case, the display is apparently beautiful and certainly attractive. The real problem is traffic created by the public's use of public streets and the testimony of all plaintiff's witnesses in the preliminary hearing was to the same effect.

The Court was gravely concerned with the question of the safety of the neighbors of defendant, Mr. Copeland. Yet the testimony of the Jefferson Parish Fire Department's representative in the preliminary hearing indicated no serious problems in this regard. The ambulance service concern was allayed by the testimony of the East Jefferson Hospital ambulance serviceman in the preliminary hearing. This testimony, with the examples given by Col. Jacobs of the Jefferson Parish Sheriff's Office, shows that the a fire in the immediate area of December 23, 1983 was handled without delay.

The testimony of the Sheriff and his personnel indicates they have handled traffic problems satisfactorily. Likewise, the Sheriff, Harry Lee, testified the cost of the traffic control was minimal.

The testimony of the defendant witnesses indicated that they were neighbors of the plaintiff, Mr. Klein, and that they were pleased with the situation since the Sheriff's plan was put into effect.

The Court is convinced that the Copeland lights are

not a nuisance. The jurisprudence has continously declared that nuisance to be abatable is a situation in which noise, smoke, animal offal smell, etc., creates a problem for the offender's neighbors. In the *Guillot Vs. Town of Lutcher*, case 373 So. 2d. 1385, 4th C.C.A. 1979, the neighbors of the car wash were "the noise, the litter, the immodest conduct of the patrons, spray and dust emanating from the property and the speeding have all continued to render living near the car wash inconvenient and in fact intolerable." The neighbors could not use their patios, work in their gardens, complete painting the houses, or live without having their yards littered. In such case, *the city had a right to pass an ordinance* to have that conduct abated as a nuisance.

In *Hero Land Co. Vs. Texaco, Inc.*, 310 So.2d 93 (La. 1975) the plaintiff's complaint was concerning a high pressure gas line which was a dangerous nuisance with consequent inherent hazards and dangers. Thus property values were seriously reduced.

The wildest stretch of the imagination cannot liken these two (2) cases to the case at hand and the Court believes L.C.C. 669 still is applicable.

The police have little regulations from the parish ordinances to take any action but traffic control. However, these are in effect ordinances concerning operation times. The ordinance provided for a 30 day limitation of signs and displays and an 11:00 p.m. cut off for noises and lights.

Absent any direct ordinance or regulation of the Jefferson Parish Council, the Court as a guide for the Jefferson Parish Sheriff's Office imposes these regulations on the defendant, Mr. Copeland and directs that the display be allowed for only 30 days each year from the 1st Saturday

in December and 30 calendar days thereafter. Likewise, the display and music is to be turned off at 11:00 p.m. nightly.

The Court knows of no authority to limit the public use of the public streets particularly as one of the streets is a major thoroughfare.

Accordingly, the Court again rules that the Copeland lighting display is not a nuisance and the permanent injunction is denied limiting the lighting of the display to 30 days each year commencing the first Saturday in December and ordering the lights and music to be turned off at 11:00 p.m. each night.

Gretna, Louisiana this 31st day of August, 1984.

/s/ Alvin Rudy Eason

JUDGE

APPENDIX H

TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 289-098 DIVISION "K"
c/w 289-142

HERBERT RODRIGUE, BURTON G. KLEIN AND MARY BORRELL

VS.

ALVIN C. COPELAND AND POPEYE'S FAMOUS FRIED CHICKEN, INC.

FILED: September 10, 1984 /s/Karen McEvers

AMENDED JUDGMENT

This matter came for hearing on this 31st day of July, 1984 on the trial on the merits and submitted on briefs.

PRESENT: Cecil Burglass, Jr.
Attorney for Plaintiff

Peter J. Butler
Attorney for Defendant,
Alvin C. Copeland and
Popeye's Famous Fried
Chicken, Inc.

Louis Gruntz
Attorney for Parish of
Jefferson

When after hearing all the evidence and reviewing the documents presented herein:

IT IS ORDERED, ADJUDGED AND DECREED that the permanent injunction is denied and the defendant Alvin C. Copeland is dirrected to limit the lighting of his display to 30 days commencing the 1st Saturday in December and ordering the lights and music to be turned off at 11:00 p.m. each night.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the preliminary injunction granted previously is now made permanent concerning the defendant Alvin C. Copeland's use of public property which use of the public property is permanently enjoined.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs in this matter is to be borne by the defendant, Alvin C. Copeland.

JUDGMENT READ, RENDERED AND SIGNED IN GRETNA, LOUISIANA THIS 10th DAY OF SEPTEMBER, 1984.

/s/ Alven Rudy Eason

JUDGE

APPENDIX I

PARISH OF JEFFERSON NO. 84-C-646

VERSUS

ALVIN C. COPELAND
CONSOLIDATED WITH

HERBERT RODRIGUE, BURTON G. KLEIN
AND MARY BORRELL COURT OF APPEAL
FIFTH CIRCUIT

VERSUS STATE OF
LOUISIANA

ALVIN C. COPELAND AND POPEYES
FAMOUS FRIED CHICKEN, INC.
ON APPLICATION FOR WRITS

Motion for stay order and application for writs of certiorari or review are denied. There are appeals filed by the plaintiffs-respondents and the defendants-relators which are set for hearing on January 7, 1985, of the trial court's judgment dated August 11, 1984 and amended on September 10, 1984 which in part imposes the restriction complained of by the relators. In December 1983 this court and the state supreme court refused to grant writs of review from the trial judge's refusal to grant a preliminary injunction in this case. Additionally, on November 26, 1984 this court denied plaintiffs' motion for a special fixing of the appeal hearing. Under our present statutes, litigants do not as a matter of right have the ability to suspend trial courts' actions in injunctive proceedings. CCP Article 3612 places the suspension of the judgment in the discretion of the trial judge. Under these circumstances, we believe both litigants' pending appeals presently set for January 7, 1985 will afford the litigants an adequate remedy for the relief sought.

Gretna, Louisiana, December 12th, 1984.

/s/ Not readable

JUDGE

/s/ Not readable

JUDGE

/s/ Lacherly

JUDGE

APPENDIX J

THE SUPREME COURT OF THE STATE OF LOUISIANA

Parish of Jefferson
vs
Alvin C. Copeland
CONSOLIDATED WITH
Herbert Rodrigue, Burton G. Klein
and Mary Borrell

VS. No. 84-CC-2108

Alvin C. Copeland and
Popeyes Famous Fried Chicken, Inc.

- - - - -

IN RE: Copeland, Alvin C. et al, Copeland, Alvin C. et al, Popeye's Famous Fried Chicken, Applying for Writ of Certiorari and/or Review Parish of Jefferson 24th Judicial District Court Div."K" Number 289-098, 289-142;to the Court of Appeal, Fifth Circuit, Number 84-C-646

- - - - -

December 14, 1984
Denied.

/s/ PFC
/s/ JAD
/s/ WFM
/s/ JLD
/s/ FAB

WATSON, J. recused.

Supreme Court of Louisiana
December 14, 1984

/s/ not ledgeble

Clerk of Court
For the Court

APPENDIX K

HERBERT RODRIGUE, BURTON G. KLEIN and MARY BORRELL — No. 84-CA-572 C/W

VERSUS — No. 84-CA-573

ALVIN C. COPELAND and POPEYE'S FAMOUS FRIED CHICKEN, INC.

PARISH OF JEFFERSON VERSUS ALVIN C. COPELAND — COURT OF APPEAL FIFTH CIRCUIT STATE OF LOUISIANA

APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT,
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 289-098 C/W 298-142, DIVISION "K"
HONORABLE ALVIN RUDY EASON, JUDGE

THOMAS J. KLIEBERT
JUDGE
FEB 11 1985

(Court composed of Judges John C. Boutall, Lawrence A. Chehardy and Thomas J. Kliebert)

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AFFIRMED

This appeal arises out of an action by Herbert Rodrigue, Burton Klein and Mary Borrell (neighbors of one of the defendants) to enjoin the defendants, Alvin C. Copeland (Copeland) and Popeyes Famous Fried Chicken, Inc., from continuing to operate a lighting display during the Christmas season at Mr. Copeland's home. The trial judge refused to grant the injunction but imposed so-called restrictions on the operation of the display.

On appeal the plaintiffs contend the trial court erred in failing to find the display was a nuisance and in violation of numerous Jefferson Parish ordinances. The defendants, who also appealed, contend the restrictions imposed on the operation of the display by the trial judge overreaches the power of the judiciary and violates the First and Fourteenth Amendments of the United States Constitution. For the reasons which follow, the judgment of the district court is affirmed.

The uncontroverted facts of the case are: (1) Since 1977 during the Christmas season, Copeland, the owner of Popeyes Famous Fried Chicken, Inc., began to decorate his home and operate a lighting display on Folse Drive at the intersection of Transcontinental Drive in Jefferson Parish; (2) The Copeland home fronts on Folse Drive with the Lake Pontchartrain levee to its rear, and (3) The home is in a limited access neighborhood, in an area zoned single family residential.

Over the years the display began to attract attention and, hence, sightseers into the area. The plaintiffs allege the number and activities of these visitors created an intolerable situation in their neighborhood. They claim difficulty in ingressing and egressing their homes, in parking, in having trash thrown over the streets and lawns of the neighborhood, and difficulty in obtaining emergency

and difficulty in obtaining emergency services and otherwise enjoying the benefits of ownership of their property and homes.

The procedural history of this case is somewhat more complicated. For clairty in understanding the procedural posture in which the case reaches this court on this appeal, we state the procedural history.

On November 30, 1983 plaintiffs instituted a suit seeking injunctive relief against the defendants. On December 1, 1983, the Parish of Jefferson filed a petition for a writ of injunction preventing Copeland from erecting the display on his property and from placing part of the display on public property. The two cases were consolidated and a hearing date on the preliminary injunction was set for December 6, 1983.

A Certificate of Fact filed into the record and signed by the trial judge shows that prior to the hearing on the preliminary injunction a pre-trial conference was held on December 3, 1983. The conference was attended by counsel for plaintiffs, counsel for defendants and two representatives of the Jefferson Parish Sheriff's office. According to the Certificate of Fact, the representatives of the Jefferson Parish Sheriff's office were present at the pre-trial conference to discuss and devise a plan to alleviate the traffic problems complained of by plaintiffs in their original petition.

At the hearing on the preliminary injunction held on December 6, 1983, a safety inspector for the Parish of Jefferson testified that numerous items contained in the display were violations of Jefferson Parish ordinances because they encroached on the Parish's 20 foot right of passage in front of residential developments. Under

cross-examination he admitted only three violations of this ordinance had been issued in approximately ten years. Likewise, he admitted numerous violations were present in photos of other homes in Jefferson Parish, but no citations were issued. His profferred explanation for the citation of Mr. Copeland was that complaints were received from the public about Copeland's displays; but, none were received in the uncited situations. On appeal, counsel for the Parish stated this to be pursuant to the Department Head's administrative decision to take action only when a complaint is received.

Also, at the December 6, 1983 hearing the Sheriff of Jefferson Parish, Harry Lee, and his deputy, Colonel Jacobs, were called as witnesses and testified that they would make attempts to control the problems complained of by the plaintiffs. Further, a representative of East Jefferson Hospital testified that in the prior year the hospital responded to two calls in the area; however, he could not state on his knowledge if the display was operated at that time. The hearing was then continued to December 13, 1983.

At the December 13th hearing, Col. Jacobs again testified as to his attempts to control the traffic situation around the display. Plaintiffs offered testimony of neighbors indicating the ingress and egress problems in the area. On December 15th, 1983, the trial court issued a judgment with written reasons denying the request for a preliminary injunction. On December 22, 1983, this court denied writs on the trial judge's refusal to grant the preliminary injunction. On January 16, 1984 the Louisiana Supreme Court also denied writs, thus permitting the matter to proceed to a hearing on a permanent injunction on July 31, 1984.

At the permanent injunction hearing, testimony was taken as to the success of the sheriff's efforts to control

traffic in the area during the display period. On August 31, 1984, the trial court issued a judgment denying the permanent injunction and ordering future displays be limited to a period of thirty days and a cessation of the lights and music each night by 11:00 o'clock. On September 10, 1984 the trial judge amended his judgment granting a permanent injunction enjoining Mr. Copeland from using public property in his display.

On October 4, 1984 plaintiffs obtained an order for a devolutive appeal to this court. Subsequently, on October 12, 1984, the defendant, Copeland, was also granted a devolutive appeal. On the same day Copeland filed a motion for a suspensive appeal which was also granted.

In response to the granting of the suspensive appeal plaintiffs filed a motion to dismiss the suspensive appeal and attached a "Per Curiam" of the trial court which stated that the suspensive appeal was granted inadvertently and in error. This court issued an order on November 21, 1984 remanding the suspensive appeal to the district court to take the appropriate action.

On December 7, 1984 defendant Copeland filed a writ application coupled with a stay order requesting a stay of the district court's judgment pending a hearing on the writ or on the appeal already lodged. The stay order and writ application were denied on the grounds the pending appeals afforded both parties an adequate remedy for the relief sought.

The Parish of Jefferson has not appealed nor has it answered the appeals taken by the plaintiffs and defendants. Thus, the matter before us consists of a devolutive appeal by plaintiffs from the district court's refusal to grant a permanent injunction to abate a nuisance and a devolutive appeal by the defendants alleging the

impropriety of the so-called restrictions imposed by the district court on his operation of the display.

A close reading of the district court's reasons for judgment reveals the trial judge's serious reservations concerning the peace and safety of the residents around the display. Nevertheless, due to the successful operation of the sheriff's traffic control plan, he felt the display was not a nuisance, therefore, abatement was not necessary, provided the display did not violate the parish ordinances and/or become a nuisance by excessive operation.

Plaintiffs argue, however, that viewed under the totality of the circumstances the display is a nuisance and, therefore, should have been completely abated. Copeland contends that once the trial court found the display was not a nuisance, he should have been allowed to continue its operations without restrictions and that the restrictions imposed on him violate his rights under the First and Fourteenth Amendments of the United States Constitution.

At the outset, we note that in a suit to abate a nuisance, a distinction between a "nuisance per se" and a "nuisance in fact" must be drawn. A nuisance per se is an act, occupation or structure which is a nuisance at all times under any circumstance. *Thornburg v. McMillin*, 392 So.2d 1119 (3rd Cir. 1980), writs denied 399 So.2d 599 (La. 1981); *Wright v. DeFatta*, 142 So.2d 489 (2nd Cir. 1962); *Hutson v. Continental Oil Co.*, 136 So.2d 714 (2nd Cir. 1961), while a nuisance in fact is one that becomes a nuisance by reasons of facts, circumstances and its surroundings. *Traylor v. Colvin*, 84 So.2d 286 (2nd Cir. 1955). Whether or not an activity constitutes a nuisance is a question of fact depending on the peculiar circumstances of the case and must be shown as such. *Wright v. DeFatta*, supra; *Thornburg v. McMillin*, supra.

Here the alleged nuisance sought to be abated cannot be categorized as a "nuisance per se". Thus, whether or not the operation of the display constitutes a nuisance in fact must be determined by inquiry into the circumstances and its surroundings.

The trial judge concluded that with the traffic control plan instituted by the sheriff and adherence to the provisions of Jefferson Parish Code of Ordinances Article V, Section 20-102(2) and Jefferson Parish Zoning Ordinance No. XVIII 5(A) the operation of the display would not be a nuisance in fact. Code of Ordinance Section 20-102(2) specifically provides the operation of electronic machines or devices in such a manner as to be audible at a distance of fifty feet between the hours of 11:00 P.M. and 7:00 A.M. would be a prima facie evidence of a violation of the section. Section 5A of Section No. XVIII of the Zoning Ordinance provides for the issuance of a temporary permit to operate for not more than thirty days special decorative displays used for holidays. Hence, the trial judge refused to grant the injunctive relief prayed for.

We have carefully reviewed the record and agree with the conclusions drawn by the trial judge, i.e. with the successful traffic control plan and the limitation on the time and period of operation the display is not a nuisance in fact.

Copeland, however, contends that these so-called restrictions infringe on his constitutional right to decorate his home to display his religious beliefs. He urges that this activity constitutes speech, hence, the restrictions are a violation of his First Amendment rights.

It is well settled that the First Amendment does not give persons unrestricted and unbridled licenses for every

possible activity/speech. States may impose reasonable regulations on First Amendment activities. As was stated by Mr. Justice Holmes, "the most stringent protection of free speech would not protect a man from falsely shouting 'FIRE' in a crowded theatre." *Schenck v. U. S.*, 249 U.S. 47, 39 S.Ct. 247 (1919).

States may restrict speech of a "loud and raucous" volume when it conflicts with the community interest in order and tranquility. Free speech cannot be exercised in a manner that constitutes a nuisance. *Kovacs v. Cooper*, 336 U.S. 77 (1974), 69 S.Ct 448. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.C. 2882 (1981), 69 L.Ed. 800. However, the State may not enforce blanket non-speech statutes that do not bear a rational relationship to the public interest in preserving order and tranquility. *Saia v. New York*, 334 U.S. 558 (1948), 68 S.Ct. 1148. Hence, Jefferson May impose restrictions on activities that offend the public peace, however, they may not impose blanket restrictions against expressions of religious belief by homeowners.

Copeland also argues that the restrictions placed on his property and not all other homes in Jefferson Parish constitutes a violation of his right to equal protection under the law.

We note that land use is not a fundamental right and zoning laws are tested by the traditional reasonableness standard. *Village of Belle Terre v. Borans*, 416 U.S. 1, (1974), 94 S.Ct. 1536, 39 L.Ed. 797. In the instant case the Parish of Jefferson has enacted two ordinances that regulate the use of property. First - that signs and displays over a specific size can only be displayed for thirty days under a temporary permit, and secondly - that noise from

mechanical devices be abated after 11:00 P.M.

As we have discussed in regard to the First Amendment right to display, the Parish has a reasonable basis for justifying the disparity of the treatment of Mr. Copeland. His display is of a magnitude that it justifies regulation to protect the Parish's legitimate interest in order and tranquility in a residential neighborhood. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions (race, religion or alienage) the constitutionality of the statutory classifications are presumed, hence, its validity requires only that the classification challenged be rationally related to a legitimate state interest. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), 96 S.Ct. 2513, 49 L.Ed. 2d 511.

In essence, Copeland argues the unconstitutionality of the so-called restrictions imposed by the trial court as though the issue involved here was - Can the defendant decorate his home for Christmas? In fact, the defendant's right to do so has never been questioned. Rather, the question presented for determination here is - Having elected to exercise his constitutional right to do so, has the defendant done so in a manner which violates a regulatory statute or in such a manner as to constitute a nuisance in fact?

The trial judge's limitations or restrictions were not an order of the court or a usurpation of the police power of the Parish of Jefferson as Copeland argues. Rather, they were parameters within which the court would not find the display to be a nuisance in fact. The defendant is not under court order to limit the time and hours of the display, however, if he operates outside of those parameters, his display could be declared a violation of the ordinances and/or declared a nuisance in fact and, hence, abated.

For the reasons stated, therefore, the judgment of the trial court is affirmed. Each party is to bear his own costs.

AFFIRMED